VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
vs.	)	Criminal No. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTIONS 3, 4, 6, 7, 10, 11, 12 AND 13

Comes now the Commonwealth and in response to the above Motions states to the court as follows:

RESPONSE TO MOTION #3 – MOTION TO REQUIRE THE COMMONWEALTH TO REVEAL ANY AGREEMENT WITH PROSECUTION WITNESSES

The Commonwealth has no objection to revealing any agreement with a prosecution witness that could conceivably influence the witness' testimony. I am aware of no such agreement at the present time.

RESPONSE TO MOTION #4 – MOTION FOR BILL OF PARTICULARS AS TO AGGRAVATING FACTORS

For almost twenty five years the Virginia Supreme Court has rejected the claim that the "vileness" and "future dangerousness" statutory predicates for the imposition of the death penalty are impermissibly vague. See Smith v. Commonwealth, 219 Va. 455, 476-478 (1978), Satcher v. Commonwealth, 244 Va. 220, 227 (1992), Stewart v. Commonwealth, 245 Va. 222, 229 (1993).

The Virginia Supreme Court has likewise rejected on numerous occasions the suggestion that a Bill of Particulars is required to provide the defendant with information of the type requested here. See Strickler v. Commonwealth, 241 Va. 482, 490 (1991) and Walker v. Commonwealth, 258 Va. 54, 62 (1999). As in those cases, the indictment here is sufficient, i.e., it gives the accused notice of

the nature and character of the offense so he can make his defense. In his request for bill of particulars, Walker sought identification of the grounds for the capital murder charge and the evidence upon which the Commonwealth would rely to prove the charge. He further requested the Commonwealth to identify and provide a "narrowing construction" of the aggravating factors upon which it intended to rely in seeking the death penalty as well as the evidence it intended to use in support of the aggravating factors.

It was held by the Court as follows at page 62:

> "The information requested by Walker is virtually identical to that requested by the defendant in Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, cert. denied, 502 U.S. 944 (1991). In Strickler, we held that where the indictment is sufficient, i.e., gives the accused "notice of the nature and character of the offense charged so he can make his defense," a bill of particulars is not required. Id. at 490, 404 S.E.2d at 233 (quoting Wilder v. Commonwealth, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976))."

The Commonwealth intends to prove both the "vileness" and the "future dangerousness" prongs as aggravating factors. It will rely on depravity of mind and the circumstances of the crime to prove "vileness" and it will prove "future dangerousness" by the circumstances of the crime and the substantial number of homicides, whether adjudicated or unadjudicated, in which this defendant has been involved.

RESPONSE TO MOTION #6 – MOTION TO PRECLUDE USE OF UNADJUDICATED ACTS

The use of unadjudicated conduct has been approved in the penalty phase of a capital case both legislatively in §19.2-264.3:2 of the 1950 Code of Virginia, and by the Supreme Court of Virginia in numerous capital cases. See Watkins v. Commonwealth, 238 Va. 341, 352 (1989), Goins v. Commonwealth, 251 Va. 442, 453 (1996), Cherrix v. Commonwealth, 257 Va. 292, 299 (1999), Walker v. Commonwealth, 258 Va. 54, 64 (1999) and Lenz v. Commonwealth, 261 Va. 451, 459 (2001).

In Stockton v. Commonwealth, 241 Va. 192 the Supreme Court held at page 209-210:

> "In Spencer II, however, we pointed out that under Code §19.2-264.4(C), a sentencing jury shall consider evidence of a defendant's "prior history" in determining whether he "would commit criminal acts of violence that would constitute a continuing serious threat to society." 238 Va. at 317, 384 S.E.2d at 798-799. We said that we have construed this provision "to permit the admission into evidence of unadjudicated misconduct," id. at 317,384 S.E.2d at 799, and we cited several cases in example.
>
> Stockton maintains that the decisions of other states indicate that evidence of unadjudicated crimes is inadmissible, and he cites cases from Indiana, Tennessee, and Washington. Our research discloses, however, a split of authority, with Georgia, Nevada, South Carolina, and Texas permitting such evidence. We reaffirm our earlier decisions and reject Stockton's contention that evidence of unadjudicated crimes is inadmissible.
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> Stockton argues further, however, that even if this type of evidence is admissible, Virginia's capital sentencing scheme is unconstitutional because it fails to require proof beyond a reasonable doubt of the commission of unadjudicated crimes and thus permits the jury to consider unreliable and prejudicial evidence. However, in Beaver v. Commonwealth, 232 Va. 521, 529, 352 S.E.2d 342, 347, cert. denied, 484 U.S. 873 (1987), we rejected an argument that such evidence is "highly inflammatory and inherently prejudicial."

RESPONSE TO MOTION #7 – MOTION FOR NOTICE OF PRIOR UNADJUDICATED ACTS

Pursuant to the provisions of Code §19.2-264.3:2 of the Code of Virginia, the Commonwealth will provide notice of its intention to present evidence of unadjudicated criminal conduct. The Commonwealth asks the court to set July 1, 2003, (which is more than four months from trial) as the date for notice to be given.

RESPONSE TO MOTION #9 – MOTION TO LIMIT EXCESSIVE NUMBERS OF LAW ENFORCEMENT OFFICERS IN THE COURTROOM

It is the position of the Commonwealth that courtroom security is vested in the Sheriff's Office and his judgment must be given great weight. We would note that this defendant already attempted escape by climbing into the ceiling of a Maryland correctional facility.

RESPONSE TO MOTION #10 – MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

In the capital case of Walker v. Commonwealth, 258 Va. 54 (1999), the Virginia Supreme Court said at page 64:

> "However, a criminal defendant has no constitutional right to peremptory challenges. Mu'Min v. Virginia, 500 U.S. 415, 424-25 (1991). And, as we have said on numerous previous occasions, there is no provision in Virginia law for granting such additional peremptory strikes. Strickler, 241 Va. At 489, 404 S.E.2d at 232, Spencer v. Commonwealth, 240 Va. 78, 84-85, 393 S.E.2d 609, 613, cert. denied, 498 U.S. 908 (1990); See Code §19.2-262. Walker has presented no reason for us to alter our previous rulings."

In Remington v. Commonwealth, 262 Va. 333, (2001), the Virginia Supreme Court sustained the trial court, rejecting the claim that the refusal to grant Remington additional peremptory challenges violated his rights under the Virginia and United States Constitutions. Id. at 342. and see Atkins v. Commonwealth, 257 Va. 160, 173-174 (1999) and Strickler v. Commonwealth, 241 Va. 482, 489 (1991).

RESPONSE TO MOTION #11 – MOTION FOR INDIVIDUAL VOIR DIRE

Capital murder defendants do not have a constitutional right to individual and sequestered voir dire of prospective jurors. Cherrix v. Commonwealth, 257 Va. 292, 300 (1999) and see Stewart v. Commonwealth, 245 Va. 222, 229 (1993) and Fisher v. Commonwealth, 236 Va. 403, 410 (1988).

In a number of capital cases tried in this jurisdiction (e.g. Dwayne Allen Wright, Bobby Lee Ramdass, Mir Aimal Kasi) the courts have asked all of the general qualifying questions to the entire panel, reserved questions dealing with the death penalty to groups of three, and questions of pretrial publicity to individual voir dire. The jurors answer under oath and it is pure speculation to suggest that candor and honesty go out the window because they are not questioned individually. No case has been cited that has held that the 6th Amendment mandates individual voir dire, and it truly is a stretch to try to find such a right. The Commonwealth asks the court to refuse individual voir dire.

RESPONSE TO MOTION #13 – MOTION FOR APPOINTMENT OF MENTAL HEALTH EXPERT

The Commonwealth has no objection to appointment of a mental health expert under Code §19.2-264.3:1. It is clear that such assistance is required by Virginia law and that no requirement of particularized need must be shown. The Commonwealth would note that the legislature has mandated that the defense is not allowed to select the expert nor is it to be given funds to employ such expert. §19.2-264.3.1A

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Response to Motions was mailed, first class to Michael S. Arif, Counsel for Defendant, 8001 Braddock Road, Suite 105, Springfield, VA 22151 and Craig S. Cooley, Counsel for Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, VA 23221, this 21st day of February, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney